

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of the Pay)
Telephone Reclassification)
and Compensation Provisions)
of the Telecommunications)
Act of 1996)

CC Docket No. 96-128

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FEDERAL COMMUNICATIONS COMMISSION
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REPLY COMMENTS OF PEOPLES TELEPHONE COMPANY, INC.
ON PETITIONS FOR RECONSIDERATION

On September 20, 1996, the Commission released its Report and Order implementing the provisions of Section 276. The Report and Order is a monumental step towards a market-driven approach to regulating the payphone industry. Peoples Telephone Company, Inc. ("Peoples") commends the Commission for balancing many competing interests of the parties and so effectively implementing Congress' policy of increasing competition in all aspects of the public telecommunications market. It is with this competitive and public interest philosophy in mind that Peoples submits the following reply comments on the Petitions for Reconsideration filed in this Proceeding.

I. The Commission Should Reject The Petitions On Reconsideration Seeking To Alter The Interim Compensation Decision.

Congress has mandated that payphone service providers ("PSPs") be "fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). The Commission has wisely determined that "the best way to ensure fair compensation is to let the market set the price for individual payphone calls." ¶ 50. To this

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Telephone Company, Inc.

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end, the Report and Order requires carriers to institute per-call tracking capabilities to track calls originating from payphones. Because per-call tracking capabilities vary from carrier to carrier and because the record demonstrates that certain carriers are not presently equipped for per-call tracking, the Commission has provided for a one-year interim period in which carriers must compensate PSPs for originating access code and subscriber 800 calls using a flat rate of \$45.85 per payphone per month. ¶¶ 96, 125.

The Commission's framework in developing this \$45.85 compensation surrogate properly balances the needs of PSPs to receive "fair compensation" while granting carriers the transitional opportunity to institute the technological and financial changes necessary in this new competitive marketplace. Congress clearly intended for PSPs to begin receiving compensation for their services within nine months of enactment of Section 276. For too long, carriers have enjoyed a multi-billion dollar free ride at the expense of PSPs with respect to subscriber 800 and access code calls. Since 1990, TOSCA has prevented PSPs from blocking access to these calls, while carriers have not been required to compensate properly PSPs for providing origination access to these services. ¶ 49. It is equally clear that carriers are attempting to maintain their free ride, and attempting to delay paying their fair share to PSPs even longer. Sprint Petition for Reconsideration at 20 (urging Commission to rescind the Report and Order in toto). The Commission should stand firm against these attempts and maintain its phased-in compensation plan, as required by Section 276.

Based on the full record of this proceeding, the Commission's plan during the one-year interim period fulfills Congress' mandate that PSPs receive fair compensation. The Commission soundly determined to base its interim plan on the existing compensation plan

developed under TOSCIA and already up and working for several years. Indeed, this plan is eminently reasonable in light of the Commission's decision to not to provide fair compensation for local coin rates for the same one year transition.

The Commission's determination of the appropriate fair compensation rate for a compensable phone call enjoys strong support in the record. The determination that \$.35 reflects the cost to PSPs of originating a subscriber 800 or access code call is certainly reasonable within the clear discretion of the Commission to establish in light of the record. Under TOSCIA, the Commission determined that a compensation rate of \$.40 per call was reasonable. In this proceeding, American Public Communications Council ("APCC") suggested a \$.40 rate. APCC Comments at 31. Peoples has suggested a \$.45 per call rate.¹ Peoples Comments at 14-15. The Regional Bell Operating Companies ("RBOCs") have proposed even higher rates in the range of \$.81 to \$.90 per call. RBOC Comments at 8-11. In light of this record, the Commission certainly has reasonably balanced the range of rates presented by the parties and has ample support to justify a rate of \$.35 per call.

The record also demonstrates that the Commission correctly determined that the average payphone originates 131 compensable call each month. Peoples submitted that each of its phones originates an average of 129 subscriber 800 and access code calls per month. Peoples Comments at 9-10. For Communications Central, that figure was 130 calls per month, and for

¹ Contrary to the contentions of Paging Network, Inc., Petition for Limited Consideration at 14 n.16, Peoples' depreciation of its payphones was based on GAPP principles relating to the treatment of acquisitions of going concerns. Therefore, the rate suggested by Peoples is based on the actual costs of operating a payphone. Moreover, Peoples cost data indicated that a compensation rate in excess of \$1 is appropriate in an environment in which the Commission did not mandate a \$.35 per call national rule.

APCC, it was 140. ¶ 124. No petitioner has disputed the estimates that Peoples and other independent PSPs have submitted concerning the average number of compensable calls. In evaluating the reasonableness of 131 calls as opposed to the 15 calls per phone determined under TOSCIA, the increase simply reflects the growth of dial-around calls and reduction of 0+ calls, and the lack of compensation for 800 subscriber calls under TOSCIA.

A flat rate of \$45.85, therefore, can hardly be considered excessive, and it certainly does not amount to a “billion dollar corporate welfare program.” Sprint Petition for Reconsideration at 8 (referring to the \$.35 per call rate). The idea that PSPs are receiving a windfall is ludicrous given the year long delay that PSPs must endure before per-call tracking is initiated. The Commission has provided for PSPs to be compensated on a reasonable basis, and the Commission should maintain its interim flat rate plan at its current rate because it represents a fair and evenhanded transition to a fully competitive payphone market, and because it is well-supported by the underlying record and statutory authority.

II. The Commission’s Ruling Properly Allows For A Reasonable Transition to A Market Rate For Local Coin Payphone Call.

The Telecommunications Act of 1996 mandates, and entrusts the Commission with developing, a plan to fairly compensate PSPs for “each and every completed intrastate and interstate call using their payphone.” 47 U.S.C. § 276(b)(1)(A). Consistent with Congress’s goal of promoting “competition among payphone providers,” 47 U.S.C. § 276(b)(1), the Commission properly concluded that the market is the best method to ensure that PSPs receive fair compensation. ¶¶ 49, 56. A market-driven approach allocates resources most efficiently,

improves service, and lowers prices for consumers. ¶ 55 At the same time, it ensures that PSPs will receive fair compensation based on the demand for their services.

The Commission's ruling with regard to local coin call rates provides a reasonable framework for the transition from regulated rates to market-driven rates. For one year after the Commission's Report and Order, states can continue to regulate local coin rate charges as they do now. Although Peoples would prefer a more expedited transition to competition, the Commission's plan is reasonable in light of the changes necessary to implement the Commission's Report and Order. Even after the one year transition period, states are not powerless to act for the public good. In those limited situations in which a state can demonstrate that the market has not been able to provide fair and reasonable payphone access, it can petition the Commission for exceptions to the ruling, and the Commission can intercede as is necessary to promote the public interest. If a state can clearly demonstrate to the Commission that at a specific location or particular area of the market was not operating properly, Peoples would not oppose a reasonable rate ceiling for that location or area. However, it is vital that the states have the burden of demonstrating market failure before the Commission acts. Otherwise, states will enact rate ceilings and other regulations in situations in which the market is fully functioning.

Because compensation rates cannot be set by both the market and state regulators, the Commission correctly determined that its market-driven approach preempted contrary state legislation. ¶¶ 57, 58. Section 276(c) expressly states that "[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." Congressional intent cannot be clearer. Congress mandated that the Commission ensure that PSPs receive fair compensation

in a manner that would promote competition in the payphone industry. It would be anomalous, therefore, for the Commission to exclude the majority of intrastate payphone calls from its Report and Order. The Report and Order provides for compensation and competition, as specified by Congress, and inconsistent state regulations cannot stand.

Several states have filed Petitions for Reconsideration challenging the Commission's authority to preempt inconsistent state regulations. *E.g.*, Joint Petition for Reconsideration by the States of Maine, Vermont, Virginia, Alabama, District of Columbia, Maryland, and Montana; Petition for Reconsideration by the Public Utility Commission of Texas. These States claim that Section 2(b) of the Communications Act prohibits the Commission from preempting their regulations governing local payphone rates. Section 2(b) states that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to . . . charges . . . or regulations for or in connection with intrastate communications service by wire or radio or any carrier." However, even the Joint Petition admits that the limitation in Section 2(b) can be overcome by a grant of additional authority by Congress. Joint Petition at 3-4; *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986); *Iowa Util. Bd. v. FCC*, No. 96-3321 (8th Cir. Oct. 15, 1996). Congress has provided that authority in Section 276 by requiring the Commission to develop a plan to compensate PSPs for "each and every completed *intrastate* and interstate call using their payphones" and by expressly preempting inconsistent state regulations. 47 U.S.C. § 267(b)(1)(A), (c). As used in Section 276, an intrastate call must include local calls from payphones. Even if Section 276 were not absolutely clear, the Commission's exercise of authority in this case is certainly a reasonable interpretation of Congressional intent. *See Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837, 843 (1984). The challenges to the Commission's authority, thus, have no merit, and the Commission should maintain its market-driven approach.

III. Both the Public Interest and Competition Would be Better Served by Allowing PSPs to Route 0- calls to Any Qualified Presubscribed IntraLATA Provider.

In the Report and Order, the Commission correctly determined that PSPs should have the ability to choose the intraLATA carrier for their payphones. Consistent with this decision, the Commission preempted state regulations that required "the routing of intraLATA calls to the incumbent LEC." ¶ 261. However, the Commission carved out an exception that let stand the states ability to "mandate that 0- calls from payphones be routed exclusively to the incumbent LEC. . . so long as the state does not mandate that the LEC ultimately carry non-emergency intraLATA calls initiated by dialing 'O' only." ¶ 262. The American Public Communications Council ("APCC") has correctly stated that the exception for 0- calls is consistent with neither the public interest nor the Commission's otherwise market-oriented philosophy. APCC Petition for Reconsideration at 3-6.

Pubic safety will actually be enhanced by allowing PSPs to choose their intraLATA operator service provider ("OSP"). An OSP chosen by the PSP will have vital information that the incumbent LEC OSP may not have. For example, in many emergency situations, it is crucial for the operator to know the location from which the caller is calling. A PSP OSP will always know the location of the PSP payphone; a LEC OSP may not. The PSP OSP, therefore, will be better able to inform emergency personnel of the location of the emergency in situations in which the caller does not know his or her address, *e.g.*, because of age or unfamiliarity with the surroundings.

A majority of states currently allow PSPs to choose their intraLATA OSP, further demonstrating that a PSPs' freedom to choose is perfectly consistent with public safety. The Commission already requires that intraLATA carriers presubscribed to payphones meet minimum standards for routing and handling emergency calls. ¶ 260; *See* Amendment of Policies and Rules Concerning Operator Service Providers and Call Aggregators, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4532 (1996). The purpose of these minimum standards is to "ensure that individuals can receive timely and proper assistance when they rely on payphones for 0- or 911 emergency calls." ¶ 260. These standards ensure that independent OSPs will have the ability to handle emergency calls.

Even in non-emergency situations, consumers are harmed by exclusive routing of 0- calls to incumbent LEC operators. First of all, the Commission's ruling requires LEC OSPs to transfer non-emergency calls to the PSP OSP. Peoples does not believe that the technology exists to effectuate switching from the LEC OSP to the PSP OSP. Often, the LEC OSP will tell a caller to hang up and dial again. Because the LEC OSP competes with the PSP OSP, the LEC OSP has no incentive to explain to the caller the reasons why the caller attempts at obtaining assistance are being frustrated. The caller, who is not aware of the different entities involved, will often blame the PSP, as that is the name on the payphone.

In many cases, Peoples has experienced problems not only from the LECs' indifference to 0- calls from its payphones, but from their aggressively anti-competitive conduct. For example, LEC operators, refusing to assist a non-emergency caller, have informed callers that they can receive assistance only from a LEC-operated payphone. Callers are, thus, left with the impression that independent PSP phones are inferior to LEC phones in the service they offer,

and they will, in the future, use only LEC phones. In this way, requiring Peoples to route 0-phone calls to its competitors places an enormous burden on People's ability to compete in the payphone marketplace. The Commission should close this unnecessary 0- loophole in an otherwise sound market-oriented framework.

IV. The Commission Should Require That Carriers Choosing To Block Payphone Calls So Inform The PSP And Its Callers As To The Genesis Of The Blocking.

Under the Commission's Report and Order, carriers that do not agree to fairly compensate (and refuse to pay the \$0.35 default rate to) independent PSPs that originate subscriber 800 and access code calls have the ability to block access from PSPs' phones to the carrier's lines. We urge to Commission to reconsider allowing the carrier to block access from payphones. Under TOSCIA, PSPs do not have the right to block access from their payphones to carriers that do not fairly compensate the PSPs. The Commission recognized that this market distortion created an uneven playing field in favor of carriers "that necessitates the Commission's involvement." ¶ 49. Yet the Commission failed to prevent carriers from blocking access from independent PSPs.

Requiring carriers to connect with independent PSPs would be in the public interest. Along with eliminating the market distortion created by uneven bargaining power, such a rule would benefit consumers and enhance confidence in the telecommunications network. Callers would always be able to connect to any other user on the network from any phone. By allowing blocking, callers would face situations in which calls could not be completed because of the particular phone from which the call was made. This situation would frustrate callers and harm the goodwill of all independent PSPs and the integrity of the network as a whole.

Although Peoples recommends Commission action to prevent call blocking, we understand the Commission's failure to act at this time, given the uneven restrictions on blocking in TOSCIA. However, if the Commission will not prevent call blocking, it is imperative that the Commission require carriers that block calls to inform the caller that it is the carrier, and not the PSP, that is responsible for the blocked call. Peoples has had unfortunate experiences in which two major carriers have blocked calls originating from Peoples' payphones. In each situation, one of which is currently on-going, callers that could not connect their calls complained to the location provider and unjustly criticized Peoples as being an inadequate payphone provider. In some instances, frustrated callers vent their anger on the phone itself, causing severe damage to valuable phones. Peoples has even received a harsh letter from a state criticizing us for not completing certain calls, when in fact, the carrier blocked the call. Because of incidences like these, it is crucial that carriers inform callers that the PSP is not responsible for their inability to complete calls. Otherwise, the goodwill of independent PSPs like Peoples will be unjustly damaged.

In addition to, but not a substitute for, informing callers about the reasons that calls cannot be connected, carriers should be required to notify the PSP that the carrier intends to block the PSPs calls. In this way, PSPs can inform location providers, place information notices on payphones, or make any other arrangements they deem appropriate. Until the carriers' ability to call-block is completely eliminated, the caller- and PSP- notification requirements are the best -- and only -- way in which to maintain a level playing field in the payphone market.

V. It Is Critical That Affected Parties Have The Right And Ability To Review And Comment On RBOC's CEI Plans.

The Commission's Report and Order requires that Bell Operating Companies, ("BOCs") submit to the Commission comparably efficient interconnection ("CEI") plans before they can negotiate for interLATA subscriptions. ¶ 199, 239. Peoples believes that CEI's plan are an important and necessary condition to a competitive and nondiscriminatory marketplace. Indeed, a fully competitive market and Congress' desire to eliminate subsidies depends on the faithful implementation by the BOCs of these plans. *See* 47 U.S.C. § 276(a).

CEI plans are integral to the framework established in Section 276. Congress has mandated that BOCs eliminate subsidies from its regulated services to its unregulated PSPs and end discrimination in favor of its PSPs. 47 U.S.C. § 276(a). Congress's policies could have best been implemented by requiring BOCs to transfer their PSPs to an affiliate. Instead, BOCs only have to comply with the non-structural safeguards in the Computer III and ONA orders. ¶ 237

Because BOCs are not required to implement structural separation, CEI plans take on an added significance. CEI plans are the only mechanism by which the Commission and other interested parties can determine whether or not the BOCs have followed Congress's mandate that they not subsidize or discriminate in favor of their own PSPs. Consequently, the Commission and interested parties must have both the legal and the effective opportunity to review and comment on these plans and to ensure that back-door subsidization and discrimination is not occurring.

While People's does not wish to delay the implementation of an acceptable CEI plan, we are concerned with Southwestern Bell's comment that CEI plans be approved on an expedited basis. Southwestern Bell Petition for Reconsideration at 4-5. The public, especially those companies that will be competing against the incumbent BOC, must have time to review

CEI plans and comment on them to ensure that interconnection takes place efficiently, smoothly, and quickly. Therefore, we oppose any action that will shield CEI plans from public scrutiny.

VI. Peoples Supports The Petition Of APCC For Fair Compensation To Extend To Inmate Services.

Peoples agrees with and incorporates by reference the Petition by APCC requesting the Commission to fairly compensate PSPs for services rendered on inmate phones.

VII. Conclusion.

For the foregoing reasons, Peoples requests that the Commission reconsider its Report and Order to the extent provided for herein.

Respectively submitted,
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CERTIFICATE OF SERVICE

I Andrea Rainey hereby certify that I have this 28th day of October, 1996 caused copies of the foregoing "Comments of Peoples Telephone Company, Inc. On Petitions for Reconsideration" to be served by hand on the following:

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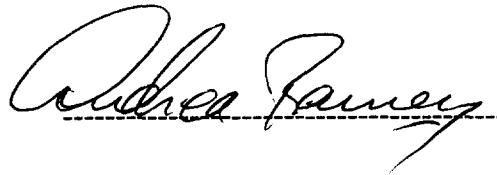
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A handwritten signature in cursive script, appearing to read "Rachelle B. Chong", written over a horizontal dashed line.